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Supreme Court, U.S.
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No. 00-896

In the
Supreme Court of the United States

JOHN O'BRIEN,
Petitioner

v.

THE UNITED STATES,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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PETITIONER'S REPLY BRIEF

1. In *United States v. Olano*, 507 U.S. 725 (1993), this Court noted, but did not decide, the question whether the government or the defendant bears the burden of proof as to prejudice when the error complained of was unclear at the time of trial but became plain on appeal due to a change in the applicable law. In the Court's words, "*Normally, although perhaps not in every case,* the *defendant* must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." *Id.* at 735 (emphasis added).

In its Brief in Opposition ("U.S.Br."), the government never discusses this passage from *Olano*. Instead, the government focuses on a different question left open by *Olano*: whether the "plainness" of an error under Rule 52(b) is to be judged under the law at the time of appeal, even if the law has changed since the time of trial. 507 U.S. at 734. *That* question, as the government notes (U.S.Br. 8), was resolved in *Johnson v. United States,* 520 U.S. 461 (1997).

But the *Johnson* Court expressly declined to decide whether prejudice from the error had been shown, and it therefore had no occasion to address the question presented here: which party bears the burden of persuasion on prejudice when the defendant has committed no forfeiture and the appeal is based not on an error to which the defendant could have objected at trial, but on an error that was made clear only after trial by a change in the law. The Court found it unnecessary to reach those questions — which, as here, involved the failure of the court to instruct on the issue of materiality — because in *Johnson* the question of materiality was "uncontroverted at trial and . . . on appeal" and the evidence supporting materiality was "overwhelming." 520 U.S. at 469-70.

Thus, it is indisputable that this Court has not resolved the question presented. That question has, however, been the subject

of contention in the courts of appeals, and they have treated the question as unresolved by this Court's decisions and have reached conflicting holdings on the issue. Compare *United States v. Viola*, 35 F.3d 37, 41-42 (2d Cir. 1994), *cert. denied*, 513 U.S. 1198 (1995), and its progeny, and *United States v. Baumgardner*, 85 F.3d 1305, 1309 n. 2 (8th Cir. 1996), with *United States v. Kramer*, 73 F.3d 1067, 1074 n.17, 1078 (11th Cir.), *cert. denied*, 519 U.S. 1011 (1996), and the decision below (all discussed in the Petition 4-12).

The government contends that this split within the circuits on an important issue — the government never actually contests the importance of the question presented — need not concern this Court because the longest line of circuit authority, the Second Circuit line of cases beginning with *Viola,* "is incorrect." U.S.Br.8. But the government's firm disagreement *on the merits* with the leading line of authority on the question presented argues for, not against, a grant of certiorari.

The government expresses the hope that the Second Circuit will, someday, see the light and renounce its modified plain error rule. U.S.Br.10-11. But, once again, the government's preferences with respect to the merits of the question presented do not negate the existence of a circuit conflict on the issue, nor do they constitute reasons for denying the petition. Furthermore, the government's obituary for *Viola* is, like the original reports of Mark Twain's death, rather premature. For the Second Circuit was reaffirming *Viola* even as the government was opining that the case is moribund:

> When the source of the alleged error is a supervening judicial decision that alters "a settled rule of law in the circuit," as Santiago alleges, we apply a "modified plain error rule" in which the government bears the burden of persuasion as to whether substantial rights have been affected. *Viola*, 35 F.3d at 42.

United States v. Santiago, 2001 U.S. App. LEXIS 733 (2nd Cir. Jan. 19, 2001) at *7.[1] Although the decision was handed down nearly a month before the government filed its brief in opposition, the government inexplicably fails to mention *Santiago*.

For that matter, the government fails to mention other post-*Johnson* cases in which the Second Circuit adhered to *Viola*'s construction of Rule 52(b). For example, in *United States v. Gore,* 154 F.3d 34 (2nd Cir. 1998), the court noted that the defendant had forfeited the legal error at issue by failing to make a timely objection at trial. *Id.* at 42. The Court of Appeals ruled that, because the error "was 'plain' under current law at the time of his trial," under the rule announced in *Viola* defendant would bear the burden of showing he had been prejudiced. *Id.* at 42 (citing *Viola*, 35 F.3d at 41). In *United States v. Feliciano*, 223 F.3d 102 (2nd Cir. 2000), the court noted that defendant had failed to raise an objection at trial to the failure to give a particular jury instruction, *id.* at 114-15, and therefore, in accord with the *Viola* rule, defendant would bear the burden of demonstrating prejudice from this error. *Id.* at 115 (citing *Viola*, 35 F.3d at 41, and *Gore*, 154 F.3d at 42). In each case, the Court of Appeals quoted and relied upon this Court's decision in *Johnson*, *see Gore*, 154 F.3d at 42; *Feliciano*, 223 F.3d at 111, 115, but apparently failed to discern any conflict between that decision and the *Viola* rule. Petitioner submits that this is because there is no conflict, insofar as *Johnson* simply had no occasion to address the question presented here (as explained *supra* at page 1).

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[1] In accord with the modified plain error rule, appellant Santiago was required to bear the burden of proving he had been prejudiced because, in contrast to the situation here, the legal error he appealed had been plain at the time of trial yet he had failed to object. 2001 U.S. App. LEXIS at *7.

2. The government's brisk assertion that the *Viola* rule is incorrect is a bit presumptuous, given (1) that the government *never disputes* the Petition's arguments in favor of placing the burden as to prejudice on the government in these circumstances, and (2) that the Petition's arguments, and the circuit court holdings on which they rest, are congruent with a principle that this Court itself approved in *Johnson*.

Rule 52(b) was "designed to encourage a defendant to raise objections during the proceeding where they might be corrected, rather than strategically to withhold an objection as a basis of appeal." *Baumgardner*, 85 F.3d at 1308. But "[w]hen the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial, and there is thus no cause to shift the burden of proving prejudice to the defendant." *Viola*, 35 F.3d at 42; *United States v. Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996), *cert. denied*, 520 U.S. 1150 (1997) (same). A construction of Rule 52(b) requiring defendants to "raise all possible objections at trial despite settled law to the contrary would encourage frivolous arguments, impeding the proceeding and wasting judicial resources." *Baumgardner*, 85 F.3d at 1309. *See also Viola*, 35 F.3d at 42 (same); *United States v. Malpeso*, 115 F.3d 155, 165 (2d Cir. 1997) (same).

This Court in *Johnson* embraced precisely the same logic, and criticized the very same perverse incentive, when deciding the related question of whether plain error is to be assessed as of the time of the appeal. The government had argued that "petitioner should have objected to the [trial] court's deciding the issue of materiality, even though near-uniform precedent both from this Court and from the Courts of Appeals held that course proper." *Johnson*, 520 U.S. at 467-68. This Court flatly disagreed: "such a rule would result in counsel's inevitably making a long and virtually useless list of objections to rulings that were plainly supported by existing precedent." 520 U.S. at 468.

3. Unwilling (and perhaps unable) to answer the Petition's arguments about why the question presented is important and why the decision below is in error, the government contends that this case is not a sound vehicle for deciding the question presented. The Petition explained that this case is an attractive vehicle for resolving the question of who should bear the burden of proof as to prejudice when the trial court fails to instruct the jury on materiality, because materiality was contested both at trial and on appeal, and the placement of the burden of persuasion as to prejudice on the petitioner may therefore have been decisive. Pet. 13-14. The government disagrees on two grounds, both of which misrepresent the proceedings below and flatly contradict the Fifth Circuit's own *factual* determinations.

First, the government contends that adequate instructions on materiality were given by the trial court. U.S.Br. 12. This is, at best, mere caviling. As the government concedes, U.S.Br. 4, the Court of Appeals squarely held that the jury had not, in fact, been properly instructed on materiality. Pet.App. 15a-16a. The contrary assertions that the government rehashes in its brief here were the same ones made to, and rejected by, the court below. *See* Govt.C.A.Br. 50-52.

Second, the government asserts that materiality "was not seriously contested at trial." U.S.Br. 12. But, once again, the Court of Appeals found precisely the contrary: "defendants put on a vigorous defense" on "materiality." Pet.App. 17a. The government insists (U.S.Br. 13 n.5) that the court below was describing not defendants' materiality arguments, but a "good faith" defense. This is nonsense. The quoted passage is found in the section of the opinion that the Fifth Circuit titled "Materiality Instruction" (Pet.App. 15a), and the paragraph expressly refers to "evidence of materiality" whereas the

government's words "good faith" are nowhere mentioned. Pet.App. 17a.[2]

Hence, unlike the other cases in which this issue has been implicated, including *Johnson, see* Petition 13-14 & n. 3, here the issue of materiality was vigorously contested and therefore the trial court's failure to instruct on materiality, and the circuit court's placement on defendant of the burden of showing prejudice therefrom, may well have made a decisive difference in the outcome.

CONCLUSION

This problem of who should bear the burden on prejudice when the law changed after the trial, and the defendant therefore committed no procedural default, will reoccur in pending criminal appeals every time a rule of law is changed by an intervening appellate decision. A writ of certiorari is in order.

Respectfully submitted,

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[2] The government purports to prove that petitioner did not contest materiality below by citing not to petitioner's briefs or testimony or exhibits, but — strangely — to the government's own brief in the court below. U.S.Br. 13. But as the Fifth Circuit itself determined, Pet.App. 17a, petitioner put on a "vigorous" defense on materiality both at trial and on appeal. *See, e.g.*, Record Vol. 85 23-25; Defendant O'Brien's C.A.Br. 16-22; O'Brien's C.A. Reply Br. 5-15.

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